No. 93-1187

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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TORWICO ELECTRONICS, INC.,
*Petitioner*,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY,
*Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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## THE THIRD CIRCUIT'S DECISION THAT CLEAN-UP ORDERS ARE NOT "CLAIMS" WILL DETRIMENTALLY AFFECT DEBTORS AND CREDITORS IN BOTH LIQUIDATIONS AND REORGANIZATIONS

Petitioner Torwico Electronics, Inc. ("Torwico")[1] submits this reply brief to rebut Respondent's argument that this case raises "hypothetical" questions because Torwico will liquidate and not reorganize. *See* Brief in Opp. at 8, 24-27. The State's argument is incorrect. This case involves a very concrete dispute: whether Torwico's assets will be used to pay for the cleanup ordered by the State or will be distributed to the Company's unsecured creditors. Moreover, the outcome of this case will have a significant impact on other corporations seeking to reorganize, as well as on individual debtors seeking a fresh start. For these reasons, this case is worthy of certiorari.

The precise issue presented by this case is not whether Torwico may obtain a discharge, but whether New Jersey's cleanup order is a "claim" within the meaning of section 101(5) of the Bankruptcy Code. That issue stands in such bold relief precisely because the company has ceased to operate and its productive assets have been liquidated. The present controversy is whether the estate's remaining funds should be distributed to Torwico's creditors, who properly filed claims in the bankruptcy, or spent to satisfy the State, which did not.[2] New Jersey

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[1] Torwico has no parent corporation or subsidiaries.

[2] That Torwico is the proper party to vindicate the rights of its creditors is not disputed. Torwico is a debtor in possession. The Bankruptcy Code confers on a debtor in possession all the rights (continued...)

argues that Torwico must comply with the State's order to clean up a site which Torwico does not own or operate because that order does not constitute a "claim" within the meaning of section 101(5) the Bankruptcy Code. Petitioner contends that the order constitutes a "claim" and that the State's failure to file a proof of claim bars it from participation in the distribution of the estate's assets. Torwico's argument that the order is a "claim" because it gives rise to a "right to payment" is bolstered, not weakened, by the fact that the estate is incapable of compliance except by the payment of money to a third party to perform the cleanup.

At the heart of this case is the fundamental bankruptcy concern for the equal treatment of similarly-situated creditors. That is, should Torwico's remaining assets be available for distribution to its unsecured creditors[3] on a pro

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[2] (...continued)
and duties of a trustee. 11 U.S.C. § 1107(a). A chapter 11 trustee has certain duties, 11 U.S.C. § 1106(a)(1), which include a fiduciary responsibility to creditors to account for all property of the estate. 11 U.S.C. § 704(a)(2). It therefore is Torwico's obligation to ensure that its assets are available for distribution to creditors at the conclusion of its bankruptcy proceedings. *See generally* 5 L. King, *Collier on Bankruptcy* ¶ 1107.02[2] (Matthew Bender 1993).

[3] These include, among numerous trade creditors, The First National Bank of Toms River, the assets of which were taken over and subsequently sold by the Federal Deposit Insurance Corporation. Joint Appendix, filed before the Third Circuit below, at 23; *see* Roberts, "Fidelity Won't Honor Branch Deal," *Philadelphia Bus. J.*, July 1, 1991, at 11 (discussing federal takeover and subsequent sale). Accordingly, the federal government is one of the creditors detrimentally affected by the decision below.

rata basis or may the State commandeer these funds to satisfy a prepetition obligation to clean up property Torwico does not own or operate? In essence, adoption of the State's position will give New Jersey priority over Torwico's other creditors. The State's position should be rejected and the definition of "claim" should be construed broadly to include this obligation so that all similarly-situated creditors who desire to participate in the distribution of the assets of a debtor in bankruptcy, including governmental agencies, have an equal opportunity to realize a return on their claims.

Even though Torwico itself may not be entitled to a discharge under the Bankruptcy Code, the Third Circuit's decision will undermine the efforts of other debtors to obtain a "fresh start." The Third Circuit's decision, if left to stand, will prevent other corporate debtors from reorganizing because they will be unable to resolve their prepetition, off-site environmental cleanup liabilities in the bankruptcy case. Indeed, Torwico originally sought to reorganize but was unsuccessful in substantial part because it could not bear the cost of satisfying the State's cleanup order if that obligation was not treated as a "claim" subject to discharge. Under the Third Circuit's decision, Torwico's prepetition liability for cleanup of its former manufacturing facility would have survived the bankruptcy and passed through to any reorganized entity, making its post-confirmation financial viability uncertain at best. It is disingenuous for the State to term Torwico's argument in favor of a fresh start "hypothetical" when the very thing that made reorganization infeasible in this case was the State's position—adopted by the Third Circuit—that Torwico's prepetition cleanup obligations could not be treated as a "claim."

The Third Circuit's opinion below has important ramifications that reach beyond the fate of Torwico's remaining assets and the cleanup of contamination at a single site in Lakewood, New Jersey.[4] The definition of "claim" is a potential issue in any bankruptcy, regardless of whether the debtor will reorganize or liquidate. If the decision below is upheld, governmental agencies will undoubtedly attempt to circumvent the carefully constructed protections afforded to debtors and creditors by the Bankruptcy Code simply by issuing orders requiring debtors to clean up prepetition contamination at sites they do not own or operate. It is for that reason, as well as to determine the disposition of its own assets, that Torwico asks this Court for a writ of certiorari.

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[4] Indeed, if cleanup of the New Hampshire Avenue site without the expenditure of public funds was New Jersey's only goal in this litigation, it could have achieved that result years ago by ordering the property owner to conduct the cleanup under the Environmental Cleanup Responsibility Act's joint and several liability scheme. *See* Pet. at 3 & n. 4; N.J. Stat. Ann. § 13:1k-6 *et seq.* (1991). It is clear that New Jersey's real interest here is the precedential value of the Third Circuit's decision for future cases—cases which certainly will involve reorganizing debtors.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

April 6, 1994

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